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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

CHARLES GUNN,
Petitioner,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,
NATURAL RESOURCES CONSERVATION SERVICES,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF AMICI CURIAE OF THE AMERICAN FARM BUREAU FEDERATION AND THE IOWA FARM BUREAU FEDERATION IN SUPPORT OF PETITIONER

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With the written consent of all the parties given and filed with the Clerk of the Court, The American Farm Bureau Federation and the Iowa Farm Bureau Federation respectfully submit this brief as amici curiae.[1]

Amici American Farm Bureau Federation and the Iowa Farm Bureau Federation pray that a Writ of Certiorari

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[1] Counsel for amici curiae have authored this brief in whole and no other person or entity other than amici, their members or counsel have made a monetary contribution to the preparation or submission of the brief.

be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

INTEREST OF AMICI

The American Farm Bureau Federation ("AFBF") is a voluntary general farm organization formed in 1919 and organized in 1920 under the General Not-For-Profit Act of the State of Illinois, AFBF was founded to protect, promote, and represent the business, economic, social and educational interests of American farmers and ranchers. AFBF has member organizations in 50 states and Puerto Rico representing more than 4.8 million member families. AFBF farm and ranch members produce virtually every kind of agricultural commodity produced commercially in the United States. The Iowa Farm Bureau Federation is a member organization of AFBF and represents the interests of farmers in the State of Iowa.

Amici (hereinafter referred to as "Farm Bureau") have a direct interest in the outcome of this case. Farm Bureau farm and ranch members own or lease significant amounts of property on which they depend for their livelihoods and upon which Americans rely for food and fibre and other basic necessities. Amici's members' continued productive and profitable use of their lands is severely restricted by the court of appeals' crabbed interpretation and application of the exemption provisions of the so-called "swampbuster" provisions of the Food Security Act. The Eighth Circuit's construction of swampbuster allows the recapture of long since converted wetlands, which is contrary to the intent of Congress in the enactment of swampbuster as a means for the protection and preservation of those wetlands that remained in their unaltered state.

Although the court of appeals' decision will have nationwide impact. Farm Bureau notes that it is of special and immediate concern to farmers in midwestern states such as Iowa where there has been widespread drainage and conversion of wetlands in order to create productive

and profitable farms. Going back as far as the Federal Swamplands Act of 1849, millions of acres of midwestern wetlands have been transferred into private ownership for the express purpose of conversion to croplands, which was usually accomplished with the technical and financial assistance of the federal government. The Eighth Circuit's misconstruction of the prior converted exemption provisions of swampbuster jeopardizes the continued economic viability of midwestern farmers in the productive use of their land.

Farm Bureau urges this Court to grant certiorari to correct the court of appeals' unjustified narrowing of the legislative exemption for prior converted wetlands from swampbuster which was expressly intended to protect farmers and ranchers in their continued use of their lands without fear about permissible conduct and exposure to substantial penalties for pursuing farming and ranching activities.

STATEMENT OF THE CASE

Petitioner, Gunn, and his predecessors in interest, have owned and farmed 160 acres of land in Iowa since 1906. Prior to 1906, the land was predominantly wetland and unsuitable for farming. In 1906, the local drainage district installed a main drainage tile with two laterals that drained Gunn's land leaving none of it in a wetland state. All of the Gunn land has been productivelv farmed on a continuous basis since 1906.

Subsequent to 1906, additional laterals were added to Gunn's land. Additional laterals allowed water from adjacent lands to drain across Gunn's land. In time, the original main drainage tile proved inadequate to handle all drainage into it so that Gunn's lands were occasionally left wet and untillable. To correct this problem, the drainage district replaced the 1906 main drainage tile in 1992 with an open ditch that was able to handle all drainage water coming from Both Gunn's and adjacent lands.

The National Resource Conservation Service (NRCS) thereafter advised Gunn that the installation of the open ditch resulted in the conversion of a number of acres of wetlands and that, if farmed, Gunn would be in violation of the swampbuster provisions of the Food Security Act of 1985 and forever barred from receiving any further federal farm program benefits. Gunn unsuccessfully pursued administrative appeals on the ground, among others, that the lands in question were prior converted since their original drainage in 1906 and thus exempt from the provisions of swampbuster. NRSC ruled that, under its interpretation of swampbuster and its regulations thereunder, to be exempt prior converted wetlands, the conversion must be complete and permanent for all time; while existing drainage facilities may be maintained, they may not be improved upon regardless of change in circumstances.

Gunn then filed this action seeking declaratory judgment contending that the NRSC's regulations and application thereof were neither consistent with nor a reasonable interpretation of swampbuster and the exemptions therefrom. Both the district court and the Eighth Circuit upheld the NRSC regulations and their application in this case. Gunn then filed with this Court for a writ of certiorari.

REASON FOR GRANTING THE WRIT

THE CIRCUIT COURT ERRED IN UPHOLDING USDA REGULATIONS THAT GO BEYOND THE CLEARLY EXPRESSED INTENT AND LANGUAGE OF SWAMPBUSTER AND ALLOW THE RECAPTURE OF PRIOR CONVERTED WETLANDS.

Agency action that violates Congressional intent is not entitled to deference. *Chemical Manufacturers Assn. v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 125, 105 S.Ct. 1102, 1107-8, 84 L.Ed.2d 90 (1985). Agency action that violates clear Congressional intent must be rejected by the reviewing court. *Chevron E.S.A.*,

Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-45, 104 S.Ct. 2778, 2781-83, 81 L.Ed.2d 694 (1984). Accordingly, this Court must review the USDA swampbuster regulations in light of the language and legislative history of the Food Security Act of 1985.

In enacting the Food Security Act of 1985, Congress included the companion conservation measures of "sodbuster" and "swampbuster."[2] Sodbuster was intended to slow the conversion of fragile, highly erodible lands to cultivation. Swampbuster was intended to slow the conversion of some 99 million acres of wetlands that were estimated to remain in the United States, particularly some 5.2 million acres that the 1982 SCS National Resources Inventory estimated to have high or medium potential for conversion to cultivation.[3]

Sodbuster and swampbuster prohibit farmers who convert highly erodible lands and wetlands into cropland after December 23, 1985, from participating in and receiving benefits from most federal farm programs. See 16 U.S.C. Sections 3821-3823. Sodbuster and swampbuster did not make it illegal to convert highly erodible lands and wetlands to agricultural use, but it established financial disincentives so strong that most farmers had little choice but to comply. See 16 U.S.C. Section 3821(1) and 7 C.F.R. Section 12.4(c).

In both the case of sodbuster and swampbuster, Congress recognized that prior converted highly erodible lands and wetlands would not be restored and certain exemptions were required for reasonable and fair implementa-

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[2] Food Security Act of 1985, P.L. 99-198, 99 Stat. 1354, codified at 16 U.S.C. Sections 3801 *et seq.* Sodbuster provisions are codified at 16 U.S.C. Sections 3811-3814. Swampbuster provisions are codified at 16 U.S.C. Sections 3821-3823.

[3] H.R. Report No. 99-271, Part 1, 99th Cong. 1st Sess., *reprinted in* 1985 U.S. Code Cong. & Ad. News 1103, at 1188 and 1190.

tion of the program.[4] Thus, in the case of swampbuster, Congress exempted prior converted wetlands. Section 3822(b)(a) of Title 16 provides, in relevant part, that "[n]o person shall become ineligible . . . for program loans or payments . . . [a]s the result of the production of an agricultural commodity on . . . [a] converted wetland if the conversion of the wetland was commenced before December 23, 1985."

The clealy stated Congressional intent and clear language of the statute provide that prior converted wetland exemption was intended to fit lands like that of Gunn's, which were tiled, drained and brought into agricultural production in 1906. And once so converted, such lands were to be forever exempt from the provisions of swampbuster whatever may happen to them in the future. Gunn's 160 acres of land were no longer included within the remaining unconverted 99 million acres of wetlands Congress said in 1985 it intented to protect with swampbuster. Having been tiled, drained and brought into agricultural production in 1906, Gunn's 160 acres were clearly the type of prior converted wetlands that Congress recognized would not be restored to wetlands status and were required to be exempted for a reasonable and fair implementation of the swampbuster program.

USDA's swampbuster regulations state that a wetland will not be considered converted if "it is determined that the actions of the persons producing such agricultural commodity does not *permanently* alter or destroy natural wetland characteristic." (Emphasis added.) 7 C.F.R. Section 12.32. The USDA regulations deny converted wetland status unless the draining permanently altered or destroyed the natural wetland characteristics for all time. The USDA regulations effectively prohibit any improvement of drainage facilities in order to maintain converted wetland status after December 23, 1985 regardless of any change in circumstance affecting the land.

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[4] *Ibid.* at 1189 and 1192.

USDA swampbuster regulations go beyond the clear intent of Congress to only protect those wetlands that remained in an unaltered state in 1985. The USDA regulations go beyond Congress' recognition that those wetlands that had been previously converted to agricultural uses would not be restored to wetland status. The USDA regulations effectively erect a barrier against meeting any change in drainage circumstances and requirements that occur after December 23, 1985 by allowing only the maintenance of facilities that existed on that date, but no improvement of any kind, nature or degree thereafter.

Contrary to Congressional intent, the USDA swampbuster regulations effectively provide the means for the recapture and restoration of prior converted wetlands. The regulations effectively negate the prior converted wetland exemption that Congress clearly and unequivocally granted farmers like Gunn whose land was drained and continuously farmed since 1906.

The Eighth Circuit's ruling upholding the USDA's swampbuster regulations cannot survive the scrutiny of *Chemical Manufacturers* and *Chevron*. Farm Bureau urges this Court to grant certiorari in this case to correct the error and restore the prior converted wetland exemption as it was intended by Congress.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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